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Television Comes To Court

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The jury today took two hours watching television to determine that PVT Bob O. Tube was guilty of grand larceny. This was the first military case tried entirely by videotape. Both the government and the accused agreed to the trial and the reactions of the jurors were mixed. COL T. V. Jones indicated that he would never choose trial by this medium himself, but it was a good way to handle normal cases. The military judge found the experience extremely valuable since he tried a desertion case at another post while the court members watched the *Tube* case. MAJ R. Leave felt it was the shortest contested case he ever sat on and appreciated the efficiency of the proceedings. The two counsel (recent graduates of the JAG School Basic Class) felt that their ability to reorganize the presentation of their testimony was advantageous although CPT Amend indicated he would appeal because his client's constitutional right of confrontation was denied him. The accused felt he had been spared the trauma of sitting in court but felt the sentence was too severe for his first offense.

The fictitious comments recited above are typical reactions occurring in numerous cities around the country that are experimenting with the divergent uses of videotape in criminal cases. The comments have merely been transferred to a military setting. The utilization of videotape as a practical innovation in the courtroom is not theoretical or "futuristic" or prophetic. Videotape is an established tool in the repetoire of the skillful advocate.[1] Judges, attorneys, court administrators, and court reporters are experimenting and exploring the potential of this most recent technological advance.[3] Videotape made an inauspicious beginning as a "useful legal tool in 1968."[2] Its modest initiation and subsequent "slow and easy" growth is not surprising when considered in its historical perspective as an enemy of the judicial process.[4] Today, however, television in general and videotape more specifically is being groomed as the "next best thing to being there."[25]

Videotape, to be of real value to the legal process, must assist in the ascertainment of truth. The invention of this technological advance does contribute to the search for truth by avoiding the loss of valuable testimony and by improving the presentation of evidence via the television screen. Yet, the short history of videotape has demonstrated its ability to assist in the ascertainment of truth and in the future it must play an even greater role in the courtroom drama.[6] After establishing the utility of videotape in the trial process, this article will discuss the constitutional issues raised by its use and lastly the rules and procedures for its introduction into evidence will be developed.

I. The Utility of Videotape in the Trial Process.

The means by which videotape has been used in the trial process can be divided into three categories: First, as a means of presenting evidentiary facts to a court;[7] secondly, by prerecording testimony for subsequent televising to an empanelled jury;[8] and thirdly, as a substitute for or a supplement to the traditional record of trial.[9]

As an evidentiary tool, the television camera has been used to film confessions,[10] lineups,[11] intoxications,[12] crime scenes,[13] experiments,[14] and witnesses.[15] The most obvious advantage is that of preserving the actual activities of government officials (*i.e.*, police officers) in confrontation situations and/or in custodial surroundings.[16] An actual videotape of a confession will assist immeasurably in reducing litigation, insuring careful compliance with constitutional requirements, and in permitting the jury to determine by visual perception the demeanor of the accused at the time he made the statement.[17] The videotaping of the Article 31 and *Miranda/Tempia* warning plus the actual con-

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fession certainly permits the court and/or the military judge to weigh the issue of the voluntariness far better than any other known system. Directly related to this ability to determine voluntariness is the existence of a new tool for defense counsel to utilize in dealing with his client in the quick and efficient disposition of cases. As a matter of fact it becomes difficult to justify the failure of police authorities to use videotape in all custodial confrontations now that this more perfect crime fighting tool is available. One court felt so strongly that it considered videotape the best available protection for the accused and the most reliable evidence available to the custodial interrogation.[18] As a matter of fact the argument can be made that the videotape is more accurate than the real testimony of the witnesses (participants) themselves, since it is not subject to human influences, prejudices or lapses of memories.

A record of the juvenile antics of a drunk driver will not only insure adequate proof of a violation but will deter case contests and perhaps encourage abstinence or at least circumspection in the future activity of the driver.[19] In this regard, however, the need for rules as to the storage, confidentiality and admissibility of evidentiary tapes becomes apparent.[20] Quite obviously, some type of confidentiality of these tapes must be maintained or serious public embarrassment or even harassment of individuals could develop.

Laboratory tests performed before the camera with clearly marked substances should also substantially reduce the amount of time needed for expert witnesses to testify in court in addition to reducing objections and pinpointing inadequacies. Re-enactment of the crime on camera may preclude the guilt of the accused or demonstrate the impossibility or improbability of his having committed the offense.

The use of videotapes for lineups,[21] for views of the crime scene,[22] and for such proceedings as polygraph tests or psychiatric boards[23] are actual and potential uses that can be developed and will be accepted. In all of these instances, the courts have previewed the tapes, ruled on objections, deleted objectionable material as necessary and then played the tapes before the jury. Invariably, the response of the court has been to overrule objections in light of the obvious superiority of the videotapes over the traditional written word, picture, or real testimony as appropriate. As indicated previously, in the

8th Circuit the videotaping was considered an added protection for the accused and the court felt its use should be encouraged.[24]

The above uses, however, are not all inclusive and obviously there are numerous other methods for utilizing videotape including the following:

a. The presentation of evidence to a commander to determine probable cause.
b. To demonstrate equipment too large to bring to court or damage done thereto.
c. As a substitute for recall of a witness.
d. To record serious injuries at time of occurrence.
e. To preserve the crime scene at the time of the offense.
f. As a prior inconsistent statement.

All of the methods suggested above are valid and potentially necessary means of utilizing videotape in the courtroom. The above methods can be adopted without any procedural or codal changes. Compliance with the procedures of paragraph 144*e*[25] of the *Manual for Courts-Martial* is necessary but only as regards the introduction of similar pieces of evidence.[26]

The second use of the videotape is for the preservation of testimony for later showing at a court.[27] The videotape of a deposition has proven to be far more effective as a tool than traditional methods of presenting a transcript to the court and/or reading a transcript to the court.[28] Quite obviously the court has a far better ability to judge the credibility of a deposed witness when it can view that witness on videotape than when only the words of the witness are read or repeated. The obvious advantage of the use of videotape is very difficult to argue against when the federal or military requirement for the introduction of depositions are met; *i.e.*, the witness is unavailable at the time of trial.[29] The perception of military law presently is that no member of the military is unavailable solely because of distance from the trial but that actual physical unavailability is necessary.[30] This is true despite the provisions of Article [449] which appear to permit a much more liberal rule. It would appear speculative to predict that the Court of Military Appeals' objections to the use of depositions would disappear as a result of television but their interpretation may become more liberal in light of the new medium. The potential of videotape, however, should not be diminished because of the superficially few instances where a deposition might be ordered. The videotape may be available for situations where a witness is unamenable to process; in situations where there is no objection by the defense, or as a court ordered videotaping where release from active duty and/or return to CONUS present an extraordinary situation.[31] It must be recognized, however, that a very real distinction exists between the substantially liberal requirements for a deposition in civil cases and the more stringent restrictions on the use of depositions in criminal cases. The Sixth Amendment right of confrontation requires more in the criminal process.[32]

The use of stipulated or agreed to testimony, however, in and of itself can be of benefit to both parties in any of the following ways: to clarify the testimony of witnesses; to economize the time consumed in lengthy examinations by counsel and to avoid the necessity for repetition in front of a court; to replace a temporarily unavailable witness when his testimony is important but nonessential; to provide a summary of expected testimony to determine the necessity for recall of a far distant witness or to prove his refusal to comply with a request or order of the court.

The third use of videotapes is as a supplement to or as a substitute for the present record of trial.[33] Numerous experiments are presently being conducted throughout the United States where criminal trials, partially or in their entirety, are utilizing PRVTT.[34] The empirical results at this stage indicate that the advantages of videotape far outweigh any actual or imagined defects.[35] When the entire trial is shown to a jury via videotape, it appears to result in substantial time savings for the court, lawyers, witnesses, judge and court administrators.[36] Obviously, short blocks of time can be scheduled for the judge, lawyers and accused to examine a particular witness, the witness is more cooperative since the wasted time is now reduced substantially and the onmipotent atmosphere of a courtroom is somewhat relieved.[37] Prerecording the testimony also provides the advantage of insuring that prejudicial and inadmissible testimony does not come before the court and it allows the attorney a second opportunity to review and change the order of his witnesses. Numerous studies also indicate that the procedure enhances the dignity of the proceedings and has a tendency to prevent at least

partially the histrionics and dramatics of counsel.[38] Videotape could be used to further enhance the proceedings by providing the means of excluding a disruptive defendant from the courtroom.[39]

Perhaps most surprising is the opinion of many jurors and the results of a study conducted by University of Oklahoma College of Law students that jurors increase their comprehension and understanding of the proceedings by watching a videotape.[40] This can be partially explained by the relaxed attitude of witnesses on videotape as compared to the actual courtroom where the pressures of the courtroom drama tend to produce inaccuracies and lapses of memory.[41] The advantages of both attorneys having the capability to review the entire transcript and being better able to measure its effects on prospective jurors assists in juror comprehension and substantially reduces unnecessary litigation for juries and better enables counsel to enter into pretrial agreements. Pre-recording of a trial for subsequent showing to a jury is not specifically prohibited in the military. However, the serious constitutional questions raised by such a procedure make such an advanced step impractical.

Paragraph 49*b* of the Manual indicates that a reporter shall record the proceedings "in longhand, shorthand, or by mechanical or electronic means."[42] Paragraph 82*a* provides that it is immaterial if the record is kept or written by the trial counsel[43] but paragraph 82*b* requires a verbatim transcript[44] and 82*a* requires the trial counsel to insure that electronic recordings are retained as required by appropriate regulations.[45] In any event, there is certainly no prohibition in using the videotape to record the record of trial since this would most certainly fall within the trial counsel's responsibility to retain electronic recordings[46] but it appears that there would exist a requirement for a verbatim transcript in addition to the videotape.[47]

If the traditional trial were to be videotaped and a verbatim transcript prepared, the appellate authorities would gain the advantage of seeing the demeanor of the witnesses and all parties to the trial. In jurisdictions such as the military where the appellate authorities can review both law and fact, this adds an entirely new dimension to the review.[48] An incidental advantage for appellate authorities is the ability to see the conduct of all parties to the trial and would permit the appellate courts to rule more comprehensively on such issues as adequacy of counsel, abuse of discretion, improper argument, and disruptions in the proceedings caused by the defendant, witnesses and possibly even spectators.

Quite obviously a complete repetition of the entire trial even on videotape might become boring, inefficient, and counterproductive on appeal. The need for complete replay, however, would arise only where the transcript was considered inadequate or to view only selected portions of the proceedings if we view the videotape as an addition to the present record on appeal.

The use of videotape in military courts may prove most profitable if guilty plea cases were videotaped and summarized records were prepared. But the requirement for verbatim records must be legislatively changed. Faster and more complete appellate review could be accomplished in this manner and the need for verbatim court reporters would be reduced. Since a videotape record is ready for playback virtually at the end of trial, the only delay in action would be preparation of the summarized record.

The videotape of the record of trial if substituted for a verbatim transcript would solve most *Dunlap*[49] problems as the tape would be ready for authentication and review the next day. Counsel could immediately review the tapes for possible appellate briefs and a better perspective would be available for the post-trial review and action by the convening authority.[50] Incidentally, experts have found no serious difficulties, either technically or theoretically, in maintaining a complete record of all proceedings in the courtroom through the use of videotape.[51]

II. The Constitutional Issue of Confrontation.

Everyone is aware of the United States Constitutional requirement for a fair trial. The bell weather for fairness is the denial of due process. The argument has been made that videotape is inherently unfair because it does not convey testimony with sufficient accuracy to permit the jury to function properly.[52] Improved techniques presently available and the real ability of videotape today to transmit the demeanor of witnesses should overcome this complaint and satisfy due process requirements.[53]

The primary objection to the use of videotape in criminal trials is the Sixth Amendment requirement that the accused be confronted by the witnesses against him.[54] This right is secured to a defendant in state and military courts as well as in federal courts.[55] The primary element of the confrontation right is to provide the defense the opportunity for cross-examination.[56] A secondary element has historically been a necessity to permit the jurors to observe the witnesses' demeanor.[57] An argument can be factually made that cross-examination is provided and the ability of the court to judge the demeanor and therefore the credibility of the witnesses is improved via videotape.[58] Perhaps true unavailability is the appropriate test for the use of videotape but logic indicates that if written transcripts are permitted in situations of true unavailability that further exceptions could be carved in the constitutional requirements when videotape is available. Dilution of the confrontation right as indicated by some scholars would still, however, require the presence of the accused at trial and of course the right of the accused to be present at any deposition has also been commonly recognized. The question of whether or not the accused must physically be present at both the taping and the televising of the tape to the jury is another problem of constitutional significance that cannot be easily resolved. Certainly, the advantage of his presence at the taping is essential since his knowledge of the entire panorama of the offense and the people involved may be of invaluable assistance to the cross-examiner. On the other hand, our Anglo-Christian concept of jurisprudence mandates a confrontation between the jurors and the accused. If the presence of the accused is necessary for both hearings then the value of videotape is not as great.

III. Introduction of the Videotape.

Quite obviously, an attorney cannot simply set up his camera and begin filming a trial in progress nor can he merely carry his television set into the courtroom and begin playing the videotape. Procedural safeguards must be developed to insure the truthfulness and accuracy of its contents. Numerous approaches have been taken to the problem and any would suffice for the military. For instance, Ohio expressly permits the use of videotape evidence by rules, the Michigan Supreme Court adopted a comprehensive rule for permitting videotape, California found that videotape fell within the definition of writing under its evidence code[59] while at least one court has required a foundation similar to that of a motion picture. However, whenever used the entire tape should be carefully previewed by the court and counsel prior to its presentation to the court. All motions and objections should be carefully considered and ruled upon by the judge. Prior to its actual showing a careful and exhaustive foundation should be laid as to the technical aspects of the tape. Its reliability, accuracy, and the circumstances surrounding the taping of the testimony should also be described to the court. Lastly, the chain of custody of the tape should be established to insure that there has been no misrepresentation, editing, or shortcutting. As we develop law in this field, it might also be appropriate to determine the production characteristics that provide good or bad tapes.

In the military, photographs, x-rays, sketches, and similar projections are admissible if verified by any person who is sufficiently familiar with the things presented to state that they faithfully represent the actual circumstances.[60] It is also interesting to note that writing is defined to include all "...pictorial, photographic, ...mechanical or electronic recording or representations of fact...."[61] Since all writings must be authenticated in military law, it appears that a combination of the two paragraphs' requirements would remove all doubt pertaining to admissibility of the videotape in court-martial proceedings. A clock recording the date and elapsed time in seconds, minutes, and hours will deter attacks on completeness of the proceedings and facilitate reviewing authorities in locating relevant portions of the testimony. Presenting the videotape to the witness for review and the witness statement by label affixed to the tape or by separate affidavit may provide further safeguarding of the tapes.

Television is here to stay as a technological tool of primary importance in the trial of criminal cases. Its value has been directly recognized by the ABA-AIA design of judicial facilities which specifically includes discussion and plans for video recording systems in future courtrooms. Canon 35 of the Draft Code of Judicial Conduct also removes the prohibition against television spawned from the *Estes* case and permits the usage of television in the courtroom for a variety of purposes. As the court stated in

the *Moran* case, "Indeed, the television camera is a stranger only in the slower moving apparatus of justice."[62] Videotape can define a silence, interpret a grunt, comprehend a nod, and acknowledge a gesture; *in toto*, videotape is what the old adage "Seeing is believing" means in the 21st Century.

Footnotes

1. Trial tactics textbooks are presently including a section if not an entire chapter on the use of television in the courtroom. *See, e.g.*, A. MORRILL, TRIAL DIPLOMACY (2d ed. 1972).
2. VIDEO SUPPORT IN THE CRIMINAL COURTS, PUBLICATION NO. R0008 (May 1974) [hereafter referred to as VIDEO SUPPORT], a publication of the National Center for State Courts. A complete list of cases videotaped in eight states is contained in the book and the present status of all cases involved in the test project. ADMINISTRATIVE OFFICE OF ILLINOIS COURTS, INTERIM REPORT TO THE SUPREME COURT OF ILLINOIS COURTS, EXPERIMENTAL VIDEO-TAPING OF COURTROOM PROCEEDING (1968).
3. "Recent experiments ...have added a new and important dimension to electronic recording of courtroom proceedings. We have put court proceedings on videotape. Not only the sounds but the sights of court proceedings were recorded." Taken from the Introduction of ADMINISTRATIVE OFFICE OF ILLINOIS COURTS, INTERIM REPORT TO THE SUPREME COURT OF ILLINOIS, EXPERIMENTAL VIDEO-TAPING OF COURTROOM PROCEEDING (1968).
4. Estes v. Texas, 381 U.S. 532 (1965).
5. McCrystal, *The Videotape Trial Comes of Age*, 57 JUDICATURE 446 (1974).
6. Note, *Video-Tape Trials: A Practical Evaluation and a Legal Analysis*, 26 STAN. L. REV. 619 (1974).
7. Benowitz, *Legal Applications of Videotape*, 47 WIS. B. BULL. 34 (1974).
8. Madden, *Illinois Pioneers Videotaping of Trials*, 55 A.B.A.J. 457 (1969). The Skokie courtroom of the Second Municipal District of the Circuit Court of Cook County, Illinois, found videotape "...far superior to any transcription of proceedings they had ever experienced." *Id.*
9. VIDEO SUPPORT, *supra* note 2.
10. Hendricks v. Swenson, 456 F2d 503 (8th Cir. 1972); Paramore v. State, 229 So.2d 855, 859 (Fla. 1969); State v. Lusk, 452 S.W.2d 219, 224 (Mo. 1970); State v. Hall, 253 La. 425, 218 So. 2d 320 (1969).
11. State v. Newman, 4 Wash. App. 588, 484 P.2d 473, 476-77 (1971); People v. Heading, 39 Mich. App. 126, 197 N.W.2d 325, 328-30 (1972).
12. People v. Ardella, 49 Ill. 2d 517, 276 N.E. 2d 302, 303-05 (Ill. 1971).
13. State v. Thurman, 84 N.M. 5, 498 P.2d 697 (1972); People v. Mines, 132 Ill. App. 2d 628, 270 N.E.2d 265, 267 (1971).
14. Demonstrations or experiments would fall into the same category and are best exemplified by Carson v. Burlington Northern Inc., 52 F.R.D. 492 (D. Neb. 1971). *See also* Kennedy, *Practical Uses of Trialvision and Depovision*, 16 TRIAL LAWYER'S GUIDE 183 (1972).
15. People v. Moran, 15 Crim. L. Rptr. 2343-2346 (Cal. App., May 23, 1974).
16. This will provide the best and most accurate record yet available.
17. Hendricks v. Swenson, *supra* note 10.
18. *Id.*
19. The deterrent effect of an actual videotape has not been explored but the potential for substantial value does exist.
20. Proposed standards must include a provision that would permit purchase of the videotape by the drunk driver which the author considers appropriate or else elaborate provisions for the security of the tape.
21. This is an actual use of videotapes that has been used and accepted by the courts. *See* State v. Newman, *supra* note 11.
22. *See* People v. Mines, *supra* note 13.
23. There are no known or reported cases of the use of videotape in this type of proceeding.
24. Hendricks v. Swenson, *supra* note 10.
25. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, (REV. ED.) para. 144e.
26. *Id.*
27. This use of videotape has become widely acceptable in civil cases and has resulted in the creation of numerous commercial companies ready and willing to record depositions for attorneys on an individual or lease basis.
28. Carson v. Burlington Northern Inc., 52 F.R.D. 492 (D. Neb. 1971).
29. Rule 15(a) of the Federal Rules of Criminal Procedure provides that a deposition may be introduced only when the witness is dead, sick, not amenable to process or otherwise not available. *See also* 18 U.S.C. 353 (1970) and the discussion in 44 A.L.R. 2d 771 (1955). In military law true unavailability must be established and distance from the trial situs is not sufficient. United States v. Gaines, 20 U.S.C.M.A. 557, 43 C.M.R. 397 (1971).
30. *Id.*
31. In a situation such as this the argument can be made that the witness is truly unavailable because not amenable to process; that is, he will not return overseas and will not voluntarily submit to the jurisdiction of the court. It could also be argued that a deposition is admissible overseas where the witness is in CONUS by reversing the rationale of *Mancusi v. Stubbs*, 408 U.S. 204 (1972) where it was held the witness was ipso facto unavailable.
32. Mattox v. United States, 156 U.S. 237 (1895). *Cf.* Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971). Perhaps the present status of the law would allow depositions.
33. McCrystal, *The Videotape Trial Comes of Age*, *supra* note 5.
34. VIDEO SUPPORT, *supra* note 2. Volume III, List of cases and reference material.
35. *Id.* at 448.
36. *Id.*
37. *Id.*
38. *Id.*

39. *See* Illinois v. Allen, 397 U.S. 337, 350 (1970). The Supreme Court upheld the right of a judge to exclude a disruptive defendant from the trial if such drastic action became necessary. At the same time, however, it was suggested in a concurring opinion that technological advances be utilized to assist in such a situation. Closed circuit television could be used to keep the accused aware of the proceedings but to prevent his disruptions.
40. J. Gordon, Records of Trial in Military Courts 70 (1973) (unpublished thesis in TJAGSA Library).
41. *Id.*
42. MANUAL FOR COURT-MARTIAL, UNITED STATES, 1969, (REV. ED.) para. 49b. "...He shall record the proceedings of the testimony taken before courts-martial...and may do this in the first instance in longhand, shorthand, or be mechanical or electronic means."
43. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, (REV. ED.) para. 82a.
44. *Id.* para. 82b.
45. *Id.* para. 82a.
46. *Id.*
47. *Id.* paras. 82a, 49b.
48. 10 U.S.C. 866 (1970).
49. United States v. Dunlap, 23 U.S.C.M.A. 135, 48 C.M.R. 751 (1974). This case establishes ninety (90) days after trial as the average time for action on a record of trial by the convening authority in normal circumstances.
50. The possibilities of using the videotape to permit the commander to review the trial or portions thereof is presently unexplored.
51. Sullivan, *Court Record by Video-Tape Experiment—A Success*, 50 CHI. B. RECORD 336, 337 (1969).
52. Hendricks v. Swenson, 456 F.2d 503 (8th Cir. 1972); People v. Moran, 15 Crim. L. Rptr. 2344 (Cal. App., May 23, 1974).
53. The relative unobtrusive nature of the present equipment and the quality of the picture should satisfy objections as to the poor quality of the reproduction.
54. Griswold, *supra* note 32.
55. United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).
56. Mattox v. United States, 156 U.S. 237 (1895).
57. *Id.*
58. Such an argument would be based upon the argument that the picture presented via the videotape is better than the actual testimony because the medium tends to focus attention on the screen rather than the surroundings of the courtroom.
59. People v. Moran, *supra* note 52.
60. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969, (REV. ED.) para. 144e.
61. *Id.* para. 143d.
62. People v. Moran, *supra* note 52, at 2345.

Article 85 and Appellate Review—A Precursor to the Changing Attitude Toward Desertion

By: Captain Ronald L. Gallant, Defense Appellate Division, US Army Judiciary

On 16 September 1974, President Ford proclaimed a policy of clemency for military deserters. Although the President's Proclamation of Clemency was unexpected by many legal authorities, and indeed was received with considerable surprise by some military lawyers, decisions of the Army Court of Military Review have heralded a new approach to convictions under Article 85 (Desertion) and presaged President Ford's reconciliation efforts to "bind the nation's wounds and to heal the scars of divisiveness." This note discusses the repeated reversals of desertion convictions by the Court of Military Review and provides guidance for counsel in the preparation of absence offense cases for trial.

To support a finding of guilty of desertion, there must exist evidence of record to prove beyond a reasonable doubt, not only an unauthorized absence, but also an intent to remain away permanently from the Army. This intent to desert, in the absence of a confession, can only be proved by circumstantial evidence. As a starting point, the *Manual for Courts-Martial, United States, 1969 (Rev. ed)*, lists a number of factors which may be used to prove an intent to desert:

> The period of absence was of a prolonged duration; that the accused attempted to dispose of his uniform or other military property; that he purchased a ticket for a distant point or was arrested or surrendered at a considerable distance from his station; that while absent he was in the neighborhood of military posts or stations and did not surrender to the military authorities; that he was dissatisfied in his company or on his ship or with the military service; that he had made remarks

indicating an intention to desert the service; that he was under charges or had escaped from confinement at the time he absented himself; that just before absenting himself he stole money, civilian clothes, or other property that would assist him in getting away; or that without being regularly separated from an armed force he enlisted or accepted an appointment in the same or another armed force without fully disclosing the fact that he had not been regularly separated or entered any foreign armed service without being authorized by the United States.

In the usual AWOL or desertion case, few of these factors will be present, and the presence of any one or two of these criteria does not raise a conclusive or even a rebuttable presumption of an intent to remain permanently away from the army. Rather, the *Manual* provides that these factors, if present, raise only an inference of an intent to desert. Paragraph 85a.

Case law is consistent with the *Manual* provision allowing only an inference of an intent to desert to be drawn from the above factors. Illustrative of this judicial policy is the weight given to the most common factor—duration of the absence. The Court of Military Appeals has held:

> While length of absence is a factor to be considered with all of the other evidence in the determination of intent to desert, it is not a substitute therefore . . . *United States v. Wiedemann*, 16 USCMA 365, 367, 36CMR 521, 523 (1966).

> The court-martial must consider the specific intent of the accused and not some substituted "established fact" of a justifiable inference. *United States v. Clothern*, 8 USCMA 158, 160, 23 CMR 382, 384 (1957). *See also United States v. Swain*, 8 USCMA 387, 24 CMR 197 (1957).

By far, the most crucial factor in determining whether or not an intent to remain away from the Army is present is whether the accused surrendered voluntarily or had to be apprehended. Where trial defense counsel can show a voluntary surrender, appellate reversal of a desertion conviction is virtually inevitable. An analysis of all of the published cases heard by the Boards of Review and United States Court of Military Appeals where an intent to desert was *found* demonstrates that in approximately 90 percent of these cases the absence was terminated by apprehension. (*See* Appendix). The reasoning behind the importance placed by the courts upon the surrender-apprehension comparison is apparent. It is entirely logical to indulge in the inference that an accused who had to be apprehended did not intend to return voluntarily to military control and that one who did surrender of his own free will did intend to return voluntarily. Although appellate results do not flow automatically from the circumstances which terminated the absence, in practice only the most extraordinary facts will support a conviction for desertion of a voluntary returnee. This message has not reached the field, however. The chart below shows the number of desertion cases reaching the U.S. Army Legal Services Agency in each year from 1964–73 and the variation in rates per thousand from the 1964 rate:

	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973
Desertion terminated by apprehension.	192	100	139	182	157	195	175	62	37	69
% change from 1964 rate per 1000 troops	BASE	-48	-32	-32	-45	-32	-37	-74	-80	-57
Desertion terminated by surrender etc.	21	12	10	21	24	43	49	18	15	21
% change from 1964 rate per 1000 troops	BASE	-43	-55	-29	-23	+36	+61	-32	-26	+19

This chart has been taken from summaries of the USALSA data made at The Judge Advocate General's School. The raw numbers of "surrender" cases are not large, but the positive changes in rates per thousand over the base year indicate that their "density" is higher than a proper sensitivity to appellate results would suggest. This conclusion is also supported by a comparison of the negative figures. There have been consistently fewer trials for desertions terminated by apprehension during the last decade, but that trend is not as strong in the surrender category. An intuitional appraisal would probably be that each category would vary about the same from year to year, but the rate of trials for desertion terminated by ap-

prehension declined during the Victorian peak, while the incidence of the surrender cases increased markedly.

Those few cases where an intent to remain away permanently from the Army was found by the appellate courts despite a surrender are characterized by a statement that the absence was not satisfactorily explained. (*See* Appendix) In most such cases, the accused never testified and the defense presented no evidence whatsoever. By "satisfactory explanation" the courts have not required that the defense justify the absence, but only that sufficient reasons be presented to provide a motive for the absence other than to specifically remain away from the Army permanently. Examples of "satisfactory explanations" have been the need to help an alcoholic mother (*United States v. Kazmorack*, 12 CMR 603 (ABR 1953)), to take care of a sick aunt (*United States v. Wilson*, 8 CMR 194 (ABR 1953)), to attend to a family illness (*United States v. Uhland*, 10 CMR 620 (AFBR 1953)) and to search for a wife and child (*United States v. Johns*, 28 CMR 639 (NBR 1959)).

Three appellate decisions in particular, all dealing with relatively lengthy absences, are instructive. In *United States v. Anderson*, 38 CMR 582 (ABR 1967), the accused surrendered after an absence of 2 years, 3½ months. Anderson testified that he had marital and family problems, that he kept his uniform, that he lived at home and worked in his home town and that he always intended to return to the Army. The Army Board of Review held that there was no intent to desert. In *United States v. Simmons*, 42 CMR 543 (ACMR 1970), the accused presented no explanation at all to explain his nearly two year absence, yet the Army Court of Military Review found no intent to desert, considering the accused's voluntary surrender. In *United States v. Stokes*, CM 430516 (ACMR 17 June 1974), the accused was absent for 3 years, 7½ months and had departed from a combat zone in Vietnam. The prosecution also presented the testimony of the accused's employer who testified that the accused stated that he intended to remain permanently with the corporation he was working for (while absent). Nevertheless, the Army Court of Military Review held that an intent to desert was not proved beyond a reasonable doubt, in light of the accused's voluntary surrender and satisfactory explanation for the absence.

While there is little question that an accused's position at trial (or during pretrial plea negotiations) is immeasurably improved if he has surrendered to military or civilian authorities, an absence terminated by apprehension does not permit a presumption of an intent to desert. In *United States v. Kazmorack*, *United States v. Wilson*, *United States v. Uhland* and *United States v. Johns*, all *supra*, each absence, although relatively short, was terminated by apprehension. However, in view of the explanations presented, no intent to desert was found by the appellate courts.

Thus, where trial defense counsel must prepare to defend an accused charged with desertion terminated by apprehension, a critical factor will be the quality and quantity of the available evidence tending to explain the absence, and to rebut an inference of intent to desert, if any is established. The single most important element will be the accused's testimony that he always intended to return to the Army and never entertained the thought of permanent separation. Second, adequate reasons for the absence, e.g. family illness, financial problems, etc. (whether from the accused or corroborating witnesses) will be needed to support the accused's testimony that he never intended to desert. Third, testimony and documentary evidence should be presented to establish the accused's readiness, and therefore his intention, to return to his unit, for example, retention of his uniform, medals, ribbons, I.D. card, and military drivers license, and evidence of previous excellent and long service. Finally, evidence should be introduced (or brought to trial counsel's attention when negotiating a pretrial agreement) showing that the accused never made an effort to conceal himself or his identity from military or civilian authorities. Evidence that the accused lived and worked in his hometown, that he always used his true name and social security number, and that he paid taxes effectively tend to rebut any inference of an intent to desert. See *United States v. Stokes*, *supra*. Evidence on all these points is not always available to defense counsel when he first receives a case, but investigation will usually turn up something on most of them. Together they can build a persuasive picture.

Following *United States v. Stokes*, *supra*, it was anticipated that the Army Court of Military Review would continue to apply its strict standard before finding an intent to desert. This pre-

diction was confirmed in the recent unreported decision in *United States v. Donaldson*, CM 431133 (ACMR 17 Sep 1974). The accused in *Donaldson* had three prior unauthorized absences and was apprehended by FBI agents at a place far removed from his place of duty. Despite these facts, the court found no intent to desert, and disapproved the findings of desertion. Following *Donaldson* the Court of Review decided *United States v. Vanier*, CM 431559 (ACMR 25 Oct 1974) an unreported opinion in which the court found no intent to desert even though the accused's nearly eight-year absence was terminated by apprehension. These decisions are unprecedented, considering the facts which necessarily formed the basis for the court's holdings. Thus, today, eight-year absences, numerous prior AWOL convictions and absences terminated by apprehension no longer will establish an intent to desert at the appellate level. What combination of factors will support desertion convictions is open to question. However, faced with the aforementioned facts—formerly considered to be nothing less than overwhelming evidence of an intent to permanently remain away from the Army—the Court of Review has consistently reversed convictions under Article 85.

Thus, the Army Court of Military Review, rather than reacting cautiously—or not at all—to the mood of the nation, as most governmental bodies are prone to do, has consistently been at the forefront of the changing attitude toward the offense of desertion. In the opinion of the Court of Review, the wartime attitudes toward desertion expressed in the Board of Review decisions of the 1950's are as outdated as trial by fire and water. An intent to desert cannot be presumed or inferred, it must be proved.

Appendix

The following are cases where the military appellate courts found an intent to desert. Yet each of these cases can be distinguished from a case of an absence terminated by surrender, and the distinguishing facts are noted. Cases are listed in chronological order by volume/page number in Court-Martial Reports, and in the name of the defendant only.

Dreschnack 1/193 (ABR 1951) Dist: no defense evidence

McConnell 1/320 (ABR 1951) Dist: apprehension

Faraco 1/356 (ABR 1951) Dist: apprehension

Jackson 1/764 (AFBR 1951) Dist: apprehension

McCrary 1/780 (AFBR 1951) Dist: no defense evidence

Percy 1/786 (AFBR 1951) Dist: apprehension

Shepherd 2/202 (ABR 1951) Dist: apprehension

Anderson 2/238 (ABR 1951) Dist: accused under extremely serious charges when going AWOL

Urban 2/246 (ABR 1951) Dist: prior AWOLS & "*Unexplained* extended absence."

Miller 2/395 (ABR 1952) Dist: accused remains silent

White 2/511 (ABR 1952) Dist: "unsatisfactorily explained"

O'Brien 2/531 (ABR 1952) Dist: absence unexplained & accused under serious charges at AWOL

Ferretti 3/57 (USCMA 1952) Dist: apprehension

Hopper 3/261 (ABR 1952) Dist: apprehension

Brussow 3/290 (ABR 1952) Dist: apprehension

Swisher 3/367 (ABR 1952) Dist: apprehension

Pascal 3/379 (ABR 1952) Dist: two "battlefield desertions," w/o explanation, manner of return not shown

Watson 3/461 (NBR 1952) Dist: unexplained

Curtis 3/735 (AFBR 1952) Dist: unexplained

Runner 3/742 (AFBR 1952) Dist: apprehension, no explanation

Cirelli 4/160 (USCMA 1952) Dist: apprehension and no satisfactory explanation

Ziglinski 4/209 (ABR 1952) Dist: "intent can be inferred from (1) prolonged absence, (2) war zone, (3) apprehension, *AND* (4) previously eluding arrest by falsely asserting his assignment to another organization

Stellman 4/232 (ABR 1952) Dist: apprehension

Taylor 4/450 (NBR 1952) Dist: facts contradicted accused's explanation

West 5/18 CMA (USCMA 1952) Dist: ap-

prehension and offense and anticipated court-martial

Dailey 5/469 (AFBR 1952) Dist: apprehension

Knoph 6/108 (USCMA 1952) Dist: apprehension

Huffman 6/244 (ABR 1952) Dist: apprehension

Linacre 6/417 (ABR 1952) Dist: apprehension

Wright 6/491 (CGBR 1952) Dist: apprehension, civilian clothes, assumed name

Coover 7/348 (ABR 1953) Dist: apprehension and previous AWOL convictions

Cochran 7/490 (AFBR 1952) Dist: apprehension

Martin 7/542 (AFBR 1952) Dist: actions to avoid apprehension, serious offense at AWOL

Williams 7/726 (AFBR 1953) Dist: apprehension

Ostrander 8/560 (NBR 1953) Dist: no satisfactory explanation, "aimless waiting around" not logical

Stuckey 8/583 (NBR 1953) Dist: apprehension

Palmer 8/633 (AFBR 1953) Dist: apprehension

Brinett 8/653 (AFBR 1953) Dist: intent to shirk important service

McNeill 2 U.S.C.M.A. 383, 9 C.M.R. 13 (1953) Dist: apprehension

Cliette 9/289 (ABR 1953) Dist: apprehension

Loewen 9/312 (ABR 1953) Dist: apprehension

Keeton 9/447 (ABR 1953) Dist: apprehension

Shuler 2 U.S.C.M.A. 611, 10 C.M.R. 109 (1953) Dist: apprehension

Rushlow 2 U.S.C.M.A. 641, 10 C.M.R. 139 (1953) Dist: apprehension

Privitt 10/502 (ABR 1953) Dist: apprehension

Linerode 11/262 (ABR 1953) Dist: financial problems were a satisfactory explanation up to Feb. 1 but not sufficient after Feb. 1 when business was sold

Savoy 11/397 (ABR 1953) Dist: apprehension

Packard 11/640 (NBR 1953) Dist: apprehension

Kelley 11/721 (AFBR 1953) Dist: no sufficient explanation and writing worthless checks during absence and "accused returned to military control"

McLean 11/755 (AFBR 1953) Dist: apprehension

Johnsey 11/798 (AFBR 1953) Dist: apprehension

Sarrett 3 U.S.C.M.A. 294, 12 C.M.R. 50 (1953) Dist: apprehension

Fout 3 U.S.C.M.A. 565, 13 C.M.R. 121 (1953) Dist: contradictory explanation

Thompson 13/648 (AFBR 1953) Dist: apprehension, admission

Prather 13/740 (AFBR 1953) Dist: apprehension

Reed 13/925 (AFBR 1953) Dist: apprehension

Frazier 14/495 (NBR 1954) Dist: admission: not to return to duty station

Muench 14/857 (AFBR 1954) Dist: apprehension

Bonds 6 U.S.C.M.A. 231, 19 C.M.R. 357 (1955) Dist: apprehension and 500 miles away and over 8 ½ years absence

Davis 19/930 (AFBR 1955) Dist: apprehension

Jewel 20/706 (AFBR 1955) Dist: apprehension

Kidd 20/713 (AFBR 1955) Dist: apprehension

Spruill 23/485 (ABR 1957) Dist: apprehension

Herring 23/489 (ABR 1957) Dist: apprehension and distant place

Olson 28/766 (AFBR 1959) Dist: previous offenses before AWOL

Rothman 30/872 (AFBR 1960) Dist: previous offense before AWOL

Fields 13 U.S.C.M.A. 193, 32 C.M.R. 193 (1962) Dist: apprehension

Morgan 32/576 (ABR 1962) Dist: would return but not to same unit

McPherson 33/542 (ABR 1963) Dist: previous AWOL of 3 years, 2 weeks prior to leaving for current offense, apprehension

Miller 33/563 (ABR 1963) Dist: apprehension

Wagner 33/853 (AFBR 1963) Dist: apprehension

Montaya 15 U.S.C.M.A. 210, 35 C.M.R. 182 (1965) Dist: only issue raised on appeal: whether AWOL ended by apprehension

Webb 35/593 (ABR 1965) Dist: accused stated "would leave again"; apprehension

Turner 37/508 (ABR 1966) Dist: escape from confinement and apprehension

Care 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969) Dist: apprehension and 3000 miles away

Herrin 40/960 (NBR 1969) Dist: religious beliefs inconsistent with Army

Wallace 19 U.S.C.M.A. 146, 41 C.M.R. 146 (1969) Dist: prior absences–course of conduct

Wilson 20 U.S.C.M.A. 71, 42 C.M.R. 263 (1970) Dist: apprehension

Moss 44/298 (ACM.R 1971) Dist: absence under order to Vietnam

Seelke 45/631 (ACMR 1972) Dist: prior AWOLs and other misconduct

Mackey 46/754 (NCMR 1972) Dist: apprehension

NOTE: The only cases dealing with desertion in 47 C.M.R. are guilty pleas.

Administrative Law Report

From remarks of Colonel Joseph N. Tenhet, Chief, Administrative Law Division, OTJAG, made at the 1974 JAG Conference.

The first topic I would like to cover is Article 138 complaints. Last year my remarks were limited to the new implementing regulation. As you know, the revised AR 27–14 was published last December with an effective date of 1 February 1974. I am happy to report that—at least from our viewpoint—the new regulation is working well, and there are no plans for any changes. Appendix 1 of this presentation, on Article 138 complaints, reviews our experience for FY 1974. Briefly, however, we processed a total of 118 complaints, of which 21 involved corrective action. When required, corrective action was usually taken before the case was forwarded to DA. As a matter of fact, The Judge Advocate General granted some measure of redress in only seven cases. The total number of complaints processed, and the percentage of those involving corrective action, are approximately the same as the 1973 statistics. In other words, the statistics for the past two years suggest that the gross numbers of Article 138 complaints have been stabilized, and that the novelty of requesting this extraordinary relief has waned.

I would like to thank you for the improvement in the processing of these complaints. Upon arrival at DA, almost all of these cases are correct, complete, and thoroughly professional. I know that each one represents considerable effort on your part. However, I can assure you that your work is not unnoticed. Each case is personally reviewed by The Judge Advocate General, or the Acting TJAG as the case may be, before the final decision is made—and this is true even though the indorsement back to your commander may be signed by General Williams or myself. Unfortunately, perhaps because of such scrutiny, the files are becoming more complicated and lengthy. The other day we received one that was about two feet thick and weighed about 14 pounds. I certainly am glad the SJA conducted an informal inquiry rather than an AR 15-6 investigation.

In the past year, we have received an unusual number of cases and inquiries concerning gifts to the Army. As many of you know, this is a complex area of administrative law, and we have prepared Appendix 2 for guidance on this subject. In addition, AR 1–100, the basic regulation, has been revised and, hopefully, clarified. The new revision is at the printers, and should be distributed to the field early next month. The new regulation and the handout should answer some of your questions.

As you may imagine, Jim Macklin and I have devoted most of our attention for the past six weeks to the so-called amnesty program. The manner in which the Department of the Army staff, under the guidance of the Deputy Chief of Staff for Personnel, planned and conducted this complex, emotional, and, to many of us, distasteful program, within the period of a few short weeks, was, in my judgment, one of the better staff efforts that I have observed in the Pentagon. As in any such effort, however, basic mistakes were made, and there are some unresolved questions.

The Administrative Law Division receives many questions from the Army Board for Correction of Military Records and the Department of the Army Suitability Evaluation Board or DASEB. It is not unusual in these case files to find a letter, petition, reclama, or other docu-

ment prepared by a Judge Advocate protesting the disposition of a particular case. The JAG officer occasionally signs such protests as "legal assistant officer" or "counsel for the respondent." Recently, the propriety and manner of rendering this legal assistance has been questioned, and the DASEB has emphatically referred one gross instance to our attention. My concern is not that such legal assistance is provided, but the tenor and sometimes downright impertinent manner in which the Judge Advocate presents his case for relief. For example, let me read you an extract from the letter referred to us by the DASEB. As background, the DASEB decides whether to include unfavorable information in DA personnel files. In this case—which involved bad debts—the soldier defended by stating that the debts were not his, but his wife's. The board was not impressed. Thus the letter; only the names have been changed to protect the innocent.

> Gentlemen:
>
> It is the purpose of this letter to respond in part to the determination of the board which was sent to SGT Brown on 1 Aug 1974. SGT Brown continues to be somewhat baffled by the board's inclusion of the failure of his wife to pay certain debts in his military personnel files. As his attorney, I am too.
>
> The days of debtor's prison are behind us in this country and have been for some time. Further, the common law tradition of regarding husband and wife as one person and not two, as in fact they are, has also gone by the boards in all nations which derived their legal traditions from the English common law. Yet the board's determination reveals that the Army clings steadfastly to antedeluvian notion of the unity of husband and wife.
>
> Finally, the "cheap shot" taken by the board with relation to SGT Brown's not proving in fact that all of the listed debts were actually paid works to rub me the wrong way as well. The man came to my office in July and told me the debts were paid. He also gave me the correspondence that DA had sent him. This correspondence indicated that he did not have the right to appear personally before the board. That being the case, his statement that the debts were paid should be enough. If you people want to play with judicial rules of evidence in making your determinations, then I suggest you work to get the AR changed so that soldiers will not be penalized as this soldier was by his inability to appear before the board. As my property teacher used to say in law school, I now say to you—"Fish or cut bait!!!!"

Well—I won't bore you with the remainder of the letter, which was signed by an active duty Judge Advocate. You may draw your own conclusions as to the impact of such a letter on the board, and whether the soldier client was in fact being assisted or harmed. I do suggest, however, that such letters adversely reflect upon the entire Corps. The same points could have been made, just as emphatically and effectively, by a dispassionate, balanced, professional letter. I urge you SJA's to control this matter in your own office and suggest that, as a general rule, such communications should be signed by the soldier client rather than the Judge Advocate.

The Enlisted Division of the Deputy Chief of Staff for Personnel has asked me to call to your attention a potential problem with the processing of fraudulent enlistments. In FY 1974, there was a 60 percent increase in fraudulent discharges. The total numbers, however, remain relatively small—only 940 were discharged for fraudulent enlistment in FY 1973, and 1,511 in FY 1974. However, in addition to this increase in the numbers, DCSPER is concerned about the character of discharges in these cases. Staff Judge Advocates should carefully review the provisions of AR 635–200 which state that the character of discharge will not be based upon pre-service activities, but upon in-service records and activities. While paragraph 14–19c of AR 635–200 provides that the receipt of pay and allowances following fraudulent enlistment may be considered as an "in-service" activity, DCSPER contemplates that this provision will be rescinded in the near future, and that pending change disproportionate weight should not be given to its provisions.

In conclusion, I would like to state that, as most of you, we suffer from too many cases and not enough time in which to dispose of them. Most of these cases are mundane, repetitive, and unexciting. However, we do occasionally receive a case that is interesting from the factual viewpoint. For example, not long ago, we were asked to decide whether a former male soldier who had undergone a transsexual opera-

tion and subsequently married an active duty male soldier was entitled to *its* PX and commissary privileges. More recently, we had the problem of deciding whether a stray dog found on post and incarcerated in the post veterinarian's pound could be lawfully disposed of under the Property Disposal Manual. Finally, a few days ago, we were requested by the Surgeon General to assist in clarifying the legal status of five mummified children whose remains are on exhibit in the Army Medical Museum. It appears that in 1896, Mrs. Oscar Lyon gave birth to the first quintuplets to be born in the United States. They died shortly after birth, and Mrs. Lyon was reluctant to bury them because of fear of grave robbers. Their remains were embalmed and retained by Mrs. Lyon until 1916, when she sold them to the Army Medical Museum for $100. After the passage of all these years, a museum in Kentucky, near the birthplace of the Lyon quintuplets, is agitating for the return of these mummies to their native state for purpose of display as a part of the Kentucky Bicentennial Celebration. I can only hope that the museum in Kentucky will file suit and then I can turn the problem over to Bill Neinast and the Litigation Division.

Appendix 1.

Gifts and Donations

I. Gifts to the United States.

A. *Conditional Gifts.* Conditional gifts to the United States may be accepted by the Secretary of the Army pursuant to the authority granted by title 10, United States Code, section 2601:

> (a) The Secretary concerned may accept, hold, administer, and spend any gift, devise, or bequest of real or personal property, made on the condition that it be used for the benefit, or in connection with the establishment, operation, or maintenance, of a school, hospital, library, museum, cemetery, or other institution or organization under the jurisdiction of his department. He may pay all necessary expenses in connection with the conveyance or transfer of a gift, devise, or bequest made under this subsection.
>
> (b) Gifts and bequests of money, and the proceeds of the sale of property, received under subsection (a) shall be deposited in the Treasury in the fund called—
>
> (1) "Department of the Army General Gift Fund", in the case of deposits of that department;
>
> (2) "Department of the Navy General Gift Fund", in the case of deposits of that department;
>
> (3) "Department of the Air Force General Gift Fund", in the case of deposits of that department; and
>
> (4) "Coast Guard General Gift Fund", in the case of deposits of the Secretary of the Treasury.
>
> The Secretary concerned may disburse funds deposited under this subsection for the benefit or use of the designated institution or organization, subject to the terms of the gift, devise, or bequest.
>
> (c) For the purposes of Federal income, estate, and gift taxes, property that is accepted under subsection (a) shall be considered as a gift, devise, or bequest to or for the use of the United States.
>
> (d) The Secretary of the Treasury, upon the request of the Secretary of a military department, may retain money, securities, and the proceeds of the sale of securities, in the gift fund of the department concerned, and may invest money and reinvest the proceeds of the sale of securities in that fund in securities of the United States or in securities guaranteed as to principal and interest by the United States. The Secretary of the Treasury may do likewise with respect to the Coast Guard General Gift Fund. The interest and profits accruing from those securities shall be deposited to the credit of the gift fund of the department concerned and may be disbursed as provided in subsection (b). Aug. 10, 1956, c. 1041, 70A Stat. 144.

Although arguably, the statute is worded broadly enough to cover conditional gifts to any institution or organization within Department of the Army, the legislative history implies that only educational, scientific, research, and memorial organizations are to be recipients. Pursuant to the *ejusdem generis* rule of statutory construction, OTJAG has therefore consistently limited the statute as including gifts only to "other *similar* institutions or organizations."

The implementing regulation which sets forth the proper procedures in forwarding proposed

conditional gifts to Department of the Army for Secretarial approval is Army Regulation 1–100, 30 January 1967. The regulation is presently undergoing extensive revision; pending receipt of the proposed 1 November 1974 revision, the 30 January 1967 version should be followed. However, the receiving agency identified in paragraphs 3 and 4 should be changed to read:

Memorial Affairs Directorate
TAG Center
HQDA (ATTN: DAAG–ME)
Washington, D.C. 20310

Whether a proposed gift is conditional depends not only upon the language of proffer, but also on the inherent uses and physical characteristics of the item. A gift of a hammer "to be used for building and repairing in the best interests of the United States" would not be conditional. There is an expression of limitation on use, but the limitation merely requires the gift to be used in the place, manner, or purpose for which it would be normally limited by its own physical characteristics. A gift is conditional only if proffered with a limitation that it be used in fewer than all of the manners, places or purposes in which it may be normally used; or if proffered on condition that it be used by specific departments or agencies which are fewer than all of the departments of agencies which normally use or may use such personal property.

If a conditional gift to the United States is not within the purview of title 10, United States Code, section 2601, then it may be accepted only under the provisions of section 1, act of 27 July 1954 (68 Stat. 566; 50 USC 1151):

> To further the defense effort of the United States—
>
> (a) the Secretary of the Treasury is authorized to accept or reject on behalf of the United States any gift of money or other intangible personal property made on condition that it be used for a particular defense purpose; and
>
> (b) the Administrator of General Services is authorized to accept or reject on behalf of the United States any gift of other property, real or personal, made on condition that it be used for a particular defense purpose.

B. *Unconditional Gifts.* Unconditional gifts to the United States of money or personal property may be accepted historically by any officer, provided acceptance will not impose an unauthorized burden on appropriated or other funds, and acceptance will otherwise be in the best interest of the United States. In the revision of Army Regulation 1–100, *supra*, this office recommended as a matter of policy that unconditional gifts should normally be forwarded to the installation commander or officer exercising general court-martial jurisdiction for acceptance.

Once accepted, unconditional gifts of money must be deposited into the general accounts of the United States Treasury, pursuant to section 3617, Revised Statutes (31 USC 484) and may not be maintained, expended, or otherwise utilized at the local level. Unconditional gifts of personal property may be maintained at the local level, but must be accounted for on appropriate property books and utilized in the same manner as other Government property (i.e., for official use only).

The acceptance of unconditional gifts of real property are limited by title 10, United States Code, section 2676, which provides:

> No military department may acquire real property not owned by the United States unless the acquisition is expressly authorized by law. The foregoing limitation shall not apply to the acceptance by a military department of real property acquired under the authority of the Administrator of General Services to acquire property by the exchange of Government property pursuant to the Federal Property and Administrative Services Act of 1949, as amended (40 USC 471, et seq.). (As amended Pub. L. 93–166, Title VI, § 608 (2), Nov. 29, 1973, 87 Stat. 682).

Specific authorizations for the Secretary of the Army to accept donations of land for enumerated purposes are contained in title 10, United States Code, sub section 2663(d); title 10, United States Code section 2672; title 10, United States Code, section 4771; and other statutes. Army Regulation 405–10, 25 May 1970, as changed by C2, 15 July 1974, should be consulted for guidance in this area.

C. *Gifts to Units.* A gift offered directly to an Army unit should, consistent with the intent of the donor, be treated as a gift to the unit welfare fund, and not as a gift to the United States. A gift not intended for a local nonappropriated fund must of necessity be considered as a gift to the United States. Paragraph 2, Army Regulation 1–100, *supra*, is misleading in its statement

that gifts to units of the Department of the Army are not gifts to the United States. This statement should be interpreted as expressing a sound policy that, whenever possible, gifts offered to units should be construed as gifts to a unit nonappropriated fund. Otherwise they will be construed as gifts to the United States. Whether these unit level gifts to the United States are conditional or unconditional again depends on the donor's intent. Thus, a gift offered "to the Fort Ord training brigade" may be construed as either a conditional gift to the United States (limited to the exclusive use of the named organization) or an unconditional gift to the United States (merely offered to the specific organization for purposes of physical acceptance on behalf of the United States) depending on the donor's intent. However, whenever consistent with the donor's intent, a gift offered at the unit level should be construed as a gift to a nonappropriated fund rather than to the United States, as indicated above.

II. Gifts to Nonappropriated Funds.

A. *Conditional Gifts.* Conditional gifts to nonappropriated funds generally may not be accepted unless Secretarial waiver of the gift limitations of paragraph 1-37a, Army Regulation 230-1, 8 April 1968, as changed by C7, 29 September 1972, is obtained. An exception is allowed to this proscription by the provisions of paragraph 11-6, Army Regulation 870-5, 18 June 1971, which permits reasonable conditions to be attached to donations of historical properties. However, no restriction exists against obtaining Secretarial waiver of the conditional gift prohibition in other instances.

B. *Unconditional Gifts.* Unconditional gifts to nonappropriated funds are authorized in accordance with paragraph 1-37, Army Regulation 230-1, *supra*, which provides:

a. Unconditional contributions and donations of property, money, or services voluntarily offered by individuals, business firms, civilian organizations, benevolent and fraternal societies, or any association outside the military departments may be accepted by nonappropriated funds when determination is made that acceptance is in the best interests of the Army. Such contributions must not result from solicitation on the part of military and/or civilian personnel. No arrangements will be made which entail the granting of special concessions or privileges to any donor or contributor, nor will public acknowledgment be made of the donor or the receipt of the donation or contribution. Property may not be accepted unless the donor relinquishes ownership rights therein. Acceptance of such contributions or donations by nonappropriated funds will be subject to prior approval as follows:

(1) By the installation commander when the value does not exceed $1,000.

(2) By the major commander when the value exceeds $1,000, but does not exceed $10,000.

(3) By the Department of the Army or major commanders outside the continental United States when the value is in excess of $10,000.

(4) The aggregate amount of concurrent or multiple contributions from a single source will determine the approving authority.

b. Contributions and donations by nonappropriated funds are authorized to be made only to agencies under control of the Department of the Army and may not be made to individuals except as provided in this and other departmental regulations.

c. Authorized transfers of assets between nonappropriated funds are not to be considered as contributions and donations for purposes of this regulation; however, welfare funds, sundry funds, or any combination thereof, may jointly finance the operation of activities benefiting participating personnel of each activity. A single fund will be designated by the appropriate commander as the fiscal agent of such projects with responsibility for accounting and collection for services rendered.

For future reference it should be noted that a proposed revision of AR 230-1 is presently being staffed which would change the monetary limits on the various approval authorities indicated above.

III. Gifts for Distributions to Individuals.

Army Regulation 1-101, 2 November 1973, sets forth the approving authority, restrictions, and general policies in regard to the acceptance of certain types of gifts which are offered for distribution to individual military personnel. Among the gifts covered are health, comfort, convenience, and morale items such as reading

materials, cigarettes, beverages, and writing paper.

APPENDIX 2.

Information Concerning Article 138 Complaints

3 SEP 1974

DAJA-AL 1974/4665

MEMORANDUM THRU: CHIEF OF STAFF, UNITED STATES ARMY

FOR: SECRETARY OF THE ARMY

SUBJECT: Complaints Under Article 138, Uniform Code of Military Justice

1. The purpose of this memorandum is to provide information concerning the manner in which complaints under Article 138, Uniform Code of Military Justice (10 USC 938...), are processed, and to provide statistics concerning the nature and disposition of such complaints during FY 1974. The Judge Advocate General has been designated to take final action on such complaints on behalf of the Secretary of the Army (para 11, AR 27–14, 10 Dec 1973 ...). Pursuant to this designation, each complaint is personally reviewed and decided by The Judge Advocate General.

2. Article 138, as implemented by Army Regulation 27–14, provides that any member of the Army who believes that he has been wronged by his commander may complain of that wrong to the commander concerned. If the commander declines to provide redress, the complainant may then submit a complaint to the general court-martial convening authority over the respondent, the commander who denied redress. The general court-martial convening authority takes appropriate action based upon the facts as disclosed by an inquiry or investigation.

3. Upon receipt and review of a complaint, the general court-martial convening authority may act on the complaint by (a) granting or denying the redress requested; (b) returning the complaint because it is not cognizable under the provisions of Article 138; (c) forwarding the complaint to an authority capable of granting redress, if he cannot grant the requested redress; (d) advising the complainant of more appropriate means to szek the requested redress, if there are other channels for such action; or (e) if the complaint is already under consideration in other chanels, advising the complainant of this.

4. After the general court-martial convening authority has taken his action, the file is then forwarded personally by him to the Department of the Army for final review. As service members became aware of the provisions of Article 138, the volume of such complaints increased significantly. For instance, in CY 1971, 37 complaints were forwarded for my review. In FY 1974, 118 such complaints were reviewed and the volume continues to increase. The general categories of the complaints received during FY 1974 [follow]. The final disposition of these complaints is reflected [below]. As indicated ..., when relief was warranted, it was granted in the majority of cases by the field commander. This indicates that the policy reflected in paragraph 3, Army Regulation 27–14..., that complaints should be resolved at the lowest level of command, is being effectively implemented.

5. The statistics concerning the number of cases in which relief is granted do not take into account those cases in which the member withdrew his complaint prior to its being forwarded to the officer exercising general court-martial jurisdiction. Also, they do not account for the unknown number of instances where soldiers have requested (formally or informally) redress from their commanders and the commanders, being apprised of the situation, have granted full relief and the case not forwarded through channels. In such instances, the soldier would have no basis or reason for submitting an Article 138 complaint. It is believed that most legitimate complaints are resolved in this manner.

HAROLD E. PARKER
Major General, USA
Acting The Judge Advocate General

CATEGORIES OF FY 1974
ARTICLE 138 COMPLAINTS

a. UCMJ matters (pretrial and post-trial confinement; referral of cases to court-martial; Article 15, UCMJ, appeals)	27
b. Elimination proceedings	10
c. Personnel actions (withdrawal of MOS; reassignments, promotions)	48
d. Administrative reprimands	9
e. Complaints from prisoners at the USDB	6

f. Cases returned without action (e.g., failure to state facts; failure to comply with statute or regulation; further investigation)	18
TOTAL	118

DISPOSITION OF FY 1974
ARTICLE 138 COMPLAINTS

	No. of Cases	Percent
*a. The complainant was wronged in whole or in part	21	18
b. The complainant was not wronged in whole or in part	57	48
c. The complainant was not cognizable	15	13
d. The complaint was returned for procedural reasons with leave to resubmit	18	15
e. The complaint was moot when received	3	3
f. The complaint was referred to other channels	4	3
TOTALS	118	100

*Of the 21 cases in which redress was granted, the authority granting the redress was:

a. The commander-respondent (redress granted after formal complaint submitted)	4
b. The general court-martial convening authority	10
c. The Judge Advocate General	7
TOTAL	21

Criminal Law Items

From: Criminal Law Division, OTJAG

1. Magistrates Program. On 15 October 1974 the Military Magistrates Program went into effect on an Army-wide basis. In response to some senior commanders who expressed concern over the impact the program may have on discipline, DA sent the following message to the commanders of FORSCOM and TRADOC on 17 October 1974:

> 1. . . .appreciate your views on the Military Magistrate Program.
>
> 2. While the sample procedure given for operation of the program did not include the provision for the commander's appeal of the magistrate's decisions, it did not preclude such a course of action. Therefore, an appeal procedure may be authorized by you, if you so desire. Any system of appeals that is adopted should avoid circumventing the intent of the program.
>
> 3. It is . . .[believed] that since you or your installation commanders will actually appoint military magistrates, they will, in effect, carry out your policies regarding pretrial confinement. Therefore, the program should not have an adverse impact on command responsibility.
>
> 4. . . .share your concern that qualified JAGC officers may not be available in sufficient numbers to fill the magistrate positions. The program is being changed to authorize the use of specially selected non-JAGC officers as magistrates where vacancies exist or where there is a lack of qualified JAGC officers available.
>
> 5. The DOD Task Force on the Administration of Military Justice in the Armed Forces recommended the use of military magistrates to the military departments. Results of tests of the Army program conducted at CONUS installations and in USAREUR, where it had been in existence on a voluntary basis for over 36 months, have been quite favorable. In most cases, successful implementation of the program has resulted in reducing tension in confinement facilities (particularly racial tension), preventing unnecessary incarceration, insuring that confined personnel were provided counsel, and speeding up trials.
>
> 6. . . .ask that you implement the program and provide your experiences and recommendations after the program has been in existence for a time. Your review of the effectiveness of the program will be most appreciated.

The Judge Advocate General deems this program to be a most worthwhile endeavor. Its successful implementation will require the wholehearted support of all Staff Judge Advocates.

2. Reg Change on Criminal Investigation Activities. Judge advocates are advised that AR 195-2, "Criminal Investigation Activities," has undergone a complete revision. Attention is directed particularly to paragraph 6-6, reproduced below:

6-6. Court appearance. a. Laboratory examiners required at a legal proceeding will be requested by priority message addressed to the appropriate USACIL commander 10 working days prior to the requested appearance date. This lead time is necessary to avoid conflicts with other commitments, allow time for administrative processing, and for court preparation. The message will include as a minimum:

(1) USACIL referral number (from laboratory report).

(2) Division completing examination.

(3) Name of accused.

(4) Date/time/place and to whom technician is to report.

(5) Number of days TDY required.

(6) Fund citation for travel and per diem.

b. The USACIL commander will have appropriate orders published. If an examiner is not available, the USACIL commander concerned will notify the requester by return priority message explaining the reason for the non-availability of the witness, such as a conflict with another court appearance, and give the exact dates that the witness will be available.

c. When the presence of an examiner is desired for trial, he should be requested to appear the day it is anticipated he will testify rather than the day the trial is to begin. This will assist in reducing the examiner's absence from the laboratory to a minimum amount of time.

d. Examiners will travel to and from court appearances and in response to requests for on-scene assistance utilizing the fastest means of transportation available. USACIL commanders are responsible for determining the type of transportation required in accordance with appropriate directives.

Judiciary Notes

From: U.S. Army Judiciary

Recurring Errors and Irregularities.

September Corrections by ACOMR of Initial Promulgating Orders:

a. Failing to show the accused's name correctly—one case.

b. Failing to show the charges and specifications correctly—seven cases.

c. Failing to show the pleas correctly—eight cases.

d. Failing to show the findings correctly—five cases.

e. Failing to show the sentence correctly—one case.

f. Failing to show the correct number of previous convictions—seven cases.

Claims Items

From; US Army Claims Service, OTJAG

The Government's Liability as a Landlord.

During the past years a steady increase in the number of tort claims, arising in Army housing areas, both in the United States and overseas, has been noted. The basis of such claims is alleged negligence of the government in the maintenance of the area and/or defects in design, construction and/or repair of the buildings. Typical claims are falls of children from unprotected windows, falls through floor openings, collisions with unmarked plate glass windows/doors and slip/falls on ice or slippery surfaces. The great majority of these claims involve personal injuries to occupants of the housing areas, i.e., military/civilian employees of the government and their dependents. Occasionally the claimant has been a business invitee or social gust of an occupant.

The relationship between the government and the military member (or civilian employee) who

occupy these quarters whether gratuitously or otherwise, is deemed tantamount to that of landlord and tenant. As such, the disposition of the majority of the claims are based upon a determination of the legal duty of the government under the established facts and circumstances.

In situations occurring within the United States and other areas where the Federal Tort Claims Act (FTCA) applies, the liability of the government is determined under the law of the place where the act or occurrence occurred (28 U.S.C. 1346(b)). However, in situations arising in foreign countries, the government's liability is determined in accordance with general principles of American law (para. 3–11, AR 27–20). Because of the provisions of the FTCA, this discussion is intended for situations arising in foreign countries.

Generally a landlord is not liable either to the tenant or his family for the safe condition of the leased premises after surrender to the lessee, i.e., the rule of caveat emptor applies. 32 Am. Jur. Landlord & Tenant, secs. 678, 746 (1st ed.); 2 Harper & James, *Torts*, sec. 27.16 (1956); Restatement, Torts, secs. 355, 356 (2d ed., 1965). However, this rule has certain exceptions. For example, the rule has no application to defects resulting from faulty design or from disrepair existing at the time of the original tenancy, if they were not reasonably discernable upon inspection. Restatement, *supra*, sec. 358, Comment *b*. Likewise the rule does not apply when the lessor retains control of a specific area or to common areas appurtenant to the leased area, i.e., hallways, sidewalks, and entrances (2 Harper & James, supra, sec. 27.17 at 1516).

According to the modern trend, negligence in the performance or the nonperformance of an obligation to repair pursuant to a valid agreement will subject a lessor to liability for personal injury to his tenant, or one in privity with the tenant. See, e.g., *Miller v. Sinclair Refining Co.*, 268 F.2d 114 (5th Cri., 1959); *Black v. Partridge*, 115 Cal. App. 2d 639, 252 P.2d 760 (1953); *Williams v. Davis*, 188 Kan. 385, 362 P.2d 641 (1961), Restatement, supra, sec. 357). See also 78 A.L.R.2d 1238. This rule applies equally to the negligent repair of defective conditions existing at the time of letting and those arising subsequently. Restatement, Torts, sec. 362, Comment *e*. In some jurisdictions where this rule is not honored, an exception is followed if a landlord reserves a right to enter and repair at his discretion (*DeClara v. Barber Steamship Lines*, 309 N.Y. 620, 132 N.E.2d 871 (1956)).

The rule concerning the failure to make repairs or negligent performance is considered very significant in determining the government's liability. In government quarters tenants are not required to make other than minor repairs (para. 3–6b, AR 210–50). Pursuant to controlling regulatory provisions, the government agrees to "provide decent and livable accommodations in good condition ..." (para. 3–4*a*, AR 210–50).

It is therefore concluded that while written leases are not executed by occupants of government quarters, the practice of the government repairing quarters is so well established or recognized as to be considered tantamount to a legal duty. What are "decent and livable accommodations in good condition" can be subject to various interpretations. It may be noted that in construing a similar provision in the D.C. Housing Code, a federal court held that such a provision "comprehends window screens which keep insects out but young children in." *Gould v. DeBeve*, 330 F.2d 826 (D.C. Cir. 1964). In developing these type cases, claims officers should examine the standards contained in Corps of Engineer publications to determine whether the proper standard has been complied with by government authorities.

Whether the government landlord actually has notice of a defect requiring correction action and sufficient time to accomplish the repairs, are collateral issues that require but brief discussion. These are factual issues in the usual case which must be established by the facts both direct and circumstantial. Proof of notice of certain defects can be assumed especially if they existed at the time the claimant occupied the quarters. Notice of defects/conditions arising after occupancy usually is based upon allegations of the claimant (or the family) that they informed a government employee of this fact. In this regard, judge advocates should impress upon Engineer and Housing Custodial personnel that an oral notice, request or complaint satisfies the notice requirement for purposes of processing a tort action against the government. The fact that Housing and/or Engineer offices require written notification (preferably on a work order form) as a prerequisite to performing the work does not insulate the government from tort liability for breach of duty to repair.

Captains' Advisory Council Notes

By: Captain David A. Schlueter, Government Appellate Division, USALSA

Continuing Legal Education: A New Twist. The legal profession finds itself being constantly bombarded with new ideas, new approaches to the law and endless new twists in applying previously unassailed precedents. The JAG Lawyer is not immune. And because of that there is a constant need within the Corps for "re-education," or to apply a more popular term, "continuing legal education."

Approximately one year ago The Judge Advocate General reactivated the dormant Captains' Advisory Council with the thought that the Council could serve as a receptacle for comments or suggestions from the field and in turn operate as an idea-generating body to implement those inputs.

The members of the Council are by no means "educators" but from the outset there was an active interest in the possibility of sponsoring a regional continuing legal education conference directed at the needs of the junior members of the Corps. Proposals were submitted to General Prugh in January 1974 who gave not only his approval but also his wholehearted and continuing support. Of course continuing legal education conferences are not new to JAG's. For a number of years such conferences have been held on a regular basis in JAG shops in Europe and, as recently as this last April, one was held for judge advocates in Korea. But a new twist was being added because of the "regional," aspect of this conference within CONUS.

The new twist became a reality on 24 and 25 June 1974 when the Advisory Council, with the cooperation of the Fort Meade JAG shop, sponsored a Regional Continuing Legal Education Conference at Fort Meade.

The purpose of running that two-day conference was two-fold. First, the conference would provide a medium for presenting a continuing legal education program which would not replace any existing programs but would instead serve as a complement to those endeavors. Secondly, the conference would allow the junior officers of the Corps to meet in a relaxed, yet productive, atmosphere and meet their peers and representatives of the offices of The Judge Advocate General and Personnel, Plans and Training.

For the initial planning sessions the Council envisioned the first demonstration conference as a cooperative effort between itself and a nearby installation capable of hosting such an activity. The Council would furnish an agenda and speakers or moderators and the host installation would shoulder the responsibility for the physical requirements such as billeting, mess, conference rooms, etc.

In planning the agenda the Council considered that:

1. The thrust would be primarily directed at some of the practical everyday problems faced by the military lawyer.

2. Liberal use would be made of seminars or workshops.

3. Rather than limiting the scope of the conference to any one area of military law, participants would be offered a broader cross-section of recent developments—realizing that a smaller amount of time would be spent on any one topic.

After a Council subcommittee had outlined a tentative agenda, council members representing various fields of military law planned and later implemented general presentations to the conference as a whole, and prepared and implemented seminars or workshops. Thus, through the use of the general presentations and seminars, the conferees were exposed to a broad cross-section of pressing legal problems and also offered a glimpse of what other JAG officers were doing in various areas of military law.

Responsibility for the overall planning and organization of the conference fell primarily on the shoulders of three conference "coordinators": two coordinators from the Council (General and Financial) and one coordinator from Fort Meade (Facilities). Other council members aided in arranging for speakers, preparing a critique sheet, outlining an agenda and serving in a myriad of other necessary capacities.

The participants represented approximately 20 posts or installations from the First Army area. Roughly half of the 60 captains attending were from the Washington area. Most of the speciality areas in military law were rep-

resented, but a distinct majority of the participants indicated an interest in military justice. The response of the conferees was most encouraging; most felt that holding such conferences was beneficial and that they should be instituted in other regions. That response, when viewed along with the wealth of enthusiasm and suggestions resulting from the conference, certainly provides impetus for the planning and implementation of future conferences.

We have here only touched on some of the high points of the conference. An after-action report was prepared and that report covers in much greater detail the planning, organization, and implementation aspects of the whole project. A complete text of the report will appear in next month's issue of *The Army Lawyer*.

There can be no doubt that there is always a pressing need for continuing legal education. A regional continuing legal education conference is but one viable means of meeting that need.

International Law Report

Taken from a presentation at the 1974 World-Wide JAG Conference by Mr. Waldemar Solf, Chief, International Law Division, OTJAG.

1974 has been another challenging year. We have logged significant accomplishments as well as initiatives that give promise on many more "tomorrows" of professionally rewarding work for our international law specialists. Our Division has two operational teams—the Status of Forces Team and the International Law Team. Each is in the "thick of things." I shall attempt to cover highlights of some of our activities to date.

Status of Forces Matters.

1. *Tri-Service Regulation.* The Tri-Service Regulation on status of forces policies, procedures and information (AR 27-50) has been revised and should be out to the field. The revision contains several rather important changes to the 1967 versions:

a. Paragraph 1-4 sets out our continued policy of maximizing US jurisdiction through waivers of local jurisdiction. It also contains provisions for waivers of US jurisdiction which require prior approval of The Judge Advocate General of the accused serviceman's service. Recommendations for approval of requests for waiver of US jurisdiction are acted on by the Office of the Secretary of Defense, however. Denials of requests for waiver may be made by the designated commanding officer. Waivers in official duty cases require approval by the President.

b. Paragraph 1-6 deals with the military legal adviser concept which received much attention in the DOD Task Force Study on the Administration of Military Justice in the Armed Forces. This new provision in AR 27-50 will allow for the assignment of judge advocates as military legal advisers ("if the occasion warrants and circumstances permit") to assist accused servicemen in cases where foreign governments have exercised their jurisdiction. He will not perform any functions of defense counsel or trial observer.

c. The new AR 27-50 also contains a sample agreement for use in contracting for local counsel and payment of expenses in connection with foreign criminal jurisdiction cases.

d. There is a provision for use of a form (DD Form 1936) attached as an Appendix to the new AR 27-50. This form can be used to provide OTJAG with additional information on particular foreign criminal jurisdiction cases. Initial reports of serious or unusual incidents will continue, however, to be reported by electrical means pursuant to AR 190-40—the "SIR" regulation.

e. The regulation also implements our policy to retain custody over military accused for as long as possible. It sets forth that efforts will be made in all cases to secure the release of an accused to the custody of American authorities pending completion of all foreign judicial proceedings, including appeals.

2. *UCMJ Charges—Foreign Recall Cases.* At the request of The Judge Advocate General, our Division is conducting a review of the current policy of preferring UCMJ charges against servicemen whose offense has brought them under the jurisdiction of the host country by vir-

tue of the applicable SOFA or other international agreement or arrangement. As you know, any US pretrial confinement is based upon UCMJ charges which are, as a general proposition, not processed beyond the Article 32 stage. That study has not been completed, and comments on the matter are welcomed.

3. *Annual SOFA Report to Congress.* We have submitted to the Senate Committee on Armed Forces the annual report on the worldwide operation of our status of forces agreements and other arrangements for the period 1 December 1972–30 November 1973. The overall rate at which foreign authorities granted waivers of their primary right to exercise jurisdiction over United States military personnel remains high. There were no significant fluctuations. The waiver rate world-wide for the current reporting period for all services was 82.2 percent which is 1.2 percent lower than the preceding period. The waiver rate world-wide during this period for the Army was 94.4 percent compared to a 95 percent waiver rate for the preceding reporting period. No United States commander has reported that jurisdictional arrangements have had a significant impact on the accomplishment of his mission.

International Law Matters.

1. *Law of War Training.* The International Affairs Division has prepared a draft DOD Directive on the implementation of the law of war which has been recently approved and sent to the printer for ultimate distribution. We concluded that there was no uniform statement of DOD policy on the implementation of the law of war. The draft Directive establishes a program for measures to be taken by the military departments and unified and specified commands to implement the law of war. Among the measures emphasized are education and training in the law of war and the establishment of system for reporting, investigating and taking corrective action with respect to alleged violations of the law of war committed by or against US personnel. Responsibility for rules of engagement is with the Joint Chiefs of Staff. The Secretary of the Army is designated as DOD's Executive Agent for administering the program with respect to violations of the law of war committed against US personnel.

In this connection, our Division has prepared changes to FM 27–10, "The Laws of Land Warfare," to ensure that the publication continues to reflect the current state of the law. Those changes are being forwarded to The Judge Advocate General's School for necessary staffing.

2. *Diplomatic Conference on Humanitarian Law.* The first session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict met in Geneva between February 20–March 29, 1974, to consider two draft Protocols submitted by the ICRC. These Protocols dealt with international and noninternational armed conflicts. One hundred twenty–five nations attended the Conference and the US delegation included Major General Prugh, The Judge Advocates General of the other services and their international law chiefs. Because of the politicization of the Conference, none of the proposed 150 draft articles were formally adopted by the entire Conference. The issue of "just wars" and wars of national liberation took up most of the Conference time. The only progress from the US point of view was in the area of increased protection for medical personnel and transports. The second session of the Diplomatic Conference will be held in Geneva for a period of approximately 10 weeks beginning 4 February 1975.

3. *Weapons Conference.* In addition to the Diplomatic Conference, simultaneous with our JAG Conference there is underway a conference of Government Experts on Weapons convened by the ICRC. This conference is taking place in Lucerne and I had the privilege to attend the first portion from 24–30 September 1974. The purpose of this meeting is to consider proposed criteria for the prohibition or restriction of use of categories of weapons and various types of weapons which may be thought to be indiscriminate or to cause unnecessary suffering. For the last three years the US has sought to interest the military operators to look at what diplomats and professors were doing in these activities. Some of this effort has paid off and it is becoming obvious that a lot more study will be required before any instruction on this subject is ripe for consideration.

The major issue which will be before the second session of the Diplomatic Conference and which will call for particularly close attention by the US Government concerns the legal position of wars of national liberation and the impact of this theory upon the law of war.

4. *DOD Directive on Weapons Review.* A new DOD instruction assigns responsibilities to The Judge Advocates General of each service for conducting a legal review of weapons in order to ensure that their intended use in armed conflict is consistent with US obligations under international law. The review will take place prior to the initiation of engineering development and will be re-examined prior to the award of any initial contract for production. It is highlighted elsewhere in this issue of *The Army Lawyer.*

5. *Panama/Trust Territories of the Pacific Islands Negotiations.* As you may have noticed in the press, in February of this year Secretary of State Kissinger flew to Panama and signed a set of eight principles which signalled the reopening of negotiations with Panama for a new treaty concerning the Canal. Because of the Secretary of the Army's personal responsibilities for the Canal and because of the military importance of the Canal we have been deeply involved in the negotiations.

Another set of negotiations with which we are involved is the attempt to establish the future political status of the Trust Territories of the Pacific Islands, or Micronesia. We expect the Marianas to enter into a commonwealth agreement with us, similar to Puerto Rico, and we hope the remainder of Micronesia will enter into a looser arrangement with us. In this latter case, we will be negotiating a Status of Forces Agreement for military presence in the Islands, primarily the Kwajalein Missile Range.

6. *Law of the Sea.* You are undoubtedly all aware of the present negotiations on the Law of the Sea. From a legal standpoint these negotiations address a task of unparalleled magnitude and complexity. Nearly 150 nations are endeavoring jointly to conclude a single agreement which will serve as a charter for the governance of the oceans which cover over two-thirds of the earth's surface. Hopefully, this agreement will establish a firm jurisdictional basis for conservation of the living resources of the sea, preservation of the ocean environment, fair distribution of the ocean's resources, and protection of international air and sea communications, transportation and trade.

Defense interests in the Law of the Sea negotiations are many and varied. The results of the negotiations may affect, for example, the freedom of military aircraft and vessels—and consequently troops and materiel—to move through and over the oceans to operational areas and the ability of the US to protect its access to critical energy and mineral resources.

The session of the Law of the Sea Conference, which recently took place in Caracas, Venezuela, made slow but substantial progress toward the goal of a comprehensive law of the sea treaty. The tone of the general debate and informal meeting in Caracas was moderate and serious. It reflected the agreement of almost all nations that the interests of all will be best served by an acceptable and timely treaty. Consideration of the complex Law of the Sea issues will be continued in a session at Geneva this coming spring with hopes of a return to Caracas for the signing of the agreement before 1976.

The Dunlap Period: Some Research Assistance

By: Captain Royal Daniel III,
Developments, Doctrine and Literature Department, TJAGSA

In June, 1974, the U.S. Court of Military Appeals published its opinion in *United States v. Dunlap* (48 CMR 751), establishing a presumptive denial of the accused's procedural rights whenever there occurred a delay of more than 90 days between sentencing by a court-martial and approval of sentence by the convening authority. The question now becomes, "what kinds of post-trial delays will be considered legitimate so as to defeat this presumption?". One source might be the Court of Military Appeals itself. Of the cases in which it has published opinions in the last few years, how many involved post-trial processing times (the "*Dunlap* Period") of 91 or more days? We all know that cases such as *Care* and *Burton* tend to produce a rash of subsidiary issues. *Burton* had its *Marshall;* there will be one or more after *Dunlap* which will raise a need for knowledge of what has gone before.

Experience with cases reaching the court suggests that *Dunlap* periods existed in many cases, even though the length of the delay was not raised by counsel and cannot always be as-

certained from the published opinion. Many of those prior cases cannot be identified through use of ordinary indices for those reasons, but the conditions and time lags in such cases may be relevant to questions in the post-*Dunlap* era. A quick look at current indices will reveal that there were only four or five signals from the court that it was becoming concerned about the trial period after sentencing.

The JAG School's data base of general court-martial records, derived from the U.S. Army Judiciary's case management system, discloses the following list of fifty-five cases, which is provided to assist the researcher. Note that the facts of many of these cases may be irrelevant to a post-trial processing issue: the all they have in common is that the U.S. Court of Military Appeals decided them, and the "*Dunlap* Period" in each exceeds 90 days. Their utility in particular situations is, as always, a matter for counsel's good judgment.

Extract of GCM Data Base
(Appellate Review Complete–1967–73)

Case	*Days Delay*
United States v. Borys, 40 CMR 259 (1967)	765
United States v. Martin, 41 CMR 211 (1970)	140
United States v. Lassiter, 39 CMR 154 (1969)	93
United States v. Shenefield, 40 CMR 165 (1969)	635
United States v. Armes, 41 CMR 15 (1969)	147
United States v. Planter, 40 CMR 181 (1969)	107
United States v. Schultz, 41 CMR 311 (1970)	97
United States v. Harrison, 41 CMR 179 (1970)	651
United States v. Hayes, 41 CMR 60 (1969)	161
United States v. Crow, 41 CMR 384 (1970)	97
United States v. Thornton, 41 CMR 140 (1969)	433
United States v. Sandoval, 41 CMR 281 (1970)	497
United States v. Walker, 42 CMR 74 (1970)	116
United States v. Redd, 42 CMR 79 (1970)	96
United States v. Chappell, 41 CMR 236 (1970)	121
United States v. Jenkins, 42 CMR 80 (1970)	101
United States v. Flack, 43 CMR 41 (1970)	118
United States v. Wilburn, 42 CMR 278 (1970)	145
United States v. Alston, 44 CMR 11 (1971)	125
United States v. Platt, 44 CMR 70 (1971)	108
United States v. Carey, 44 CMR 87 (1971)	95
United States v. Andrews, 44 CMR 219 (1972)	128
United States v. Burton, 44 CMR 166 (1971)	162
United States v. Meade, 43 CMR 350 (1972)	140
United States v. Smith, 44 CMR 19 (1971)	107
United States v. Staten, 45 CMR 267 (1972)	107
United States v. Kilgore, 44 CMR 89 (1972)	115
United States v. Graham, 45 CMR 263 (1972)	134
United States v. Whitmire, 45 CMR 42 (1972)	200
United States v. Mackey, 45 CMR 28 (1972)	100
United States v. Eller, 43 CMR 241 (1971)	296
United States v. Hendrix, 45 CMR 186 (1972)	178
United States v. Wheeler, 46 CMR 149 (1972)	231
United States v. Jones, 44 CMR 269 (1972)	230
United States v. Pettingill, 45 CMR 183 (1972)	122
United States v. Kinard, 45 CMR 74 (1972)	135
United States v. Stevenson, 45 CMR 200 (1972)	738
United States v. Biggs, 46 CMR 16 (1972)	115
United States v. Jarvis, 46 CMR 260 (1973)	101
United States v. Lugo, 46 CMR 325 (1973)	151
United States v. Green, 46 CMR 51 (1972)	127
United States v. Teasley, 46 CMR 131 (1973)	163
United States v. Sutton, 45 CMR 118 (1972)	193
United States v. Clayborne, 47 CMR 239 (1973)	145
United States v. Wilkins, 46 CMR 334 (1973)	145
United States v. Willis, 46 CMR 112 (1973)	179
United States v. Carson, 46 CMR 203 (1973)	107
United States v. Timmons, 46 CMR 226 (1973)	181
United States v. Hamilton, 46 CMR 209 (1973)	107
United States v. White, 45 CMR 357 (1972)	678
United States v. Irwin, 46 CMR 168 (1973)	194
United States v. Gray, 47 CMR 484 (1974)	212
United States v. Rogers, 46 CMR 297 (1973)	151
United States v. Boxdale, 47 CMR 351 (1973)	114
United States v. Colon Atienza, 47 CMR 336 (1973)	299

New DOD Instruction on Legality of Weapons Under International Law

New Department of Defense Instruction 5500.15 assigns responsibilities and prescribes procedures for DOD compliance with international laws pertaining to acquisition and procurement of weapons. The new Instruction, "Review of Legality of Weapons Under International Law" was issued pursuant to enumerated policy that all actions of the Department of Defense with respect to the acquisition and procurement of weapons, and their intended use in armed conflict "shall be consistent with the obligations assumed by the United States Government under all applicable treaties, with customary international law, and, in particular, with the laws of war." The Instruction, dated 16 October 1974 and effective immediately, applies to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff and, Defense Agencies (referred to collectively within as "DOD Components"). Section IV, "Responsibilities," of the Instruction is reproduced below. Implementing regulations hereunder are to be furnished to the

General Counsel, Department of Defense, within 90 days.

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IV. RESPONSIBILITIES

A. The Secretary of each Military Department will insure that a legal review by his Judge Advocate General is conducted of all weapons intended to meet a military requirement of his Department in order to ensure that their intended use in armed conflict is consistent with the obligations assumed by the United States under all applicable international laws including treaties to which the United States is a party and customary international law, in particular the laws of war.

1. The legal review will take place prior to the award of an initial contract for production. At such subsequent stages in acquisition or procurement as the Judge Advocate General concerned determines it is appropriate to do so, he may require a further legal review of any weapon.

2. Each Judge Advocate General will maintain permanent files of opinions issued by him in implementation of this Instruction.

B. Each DoD Component having primary responsibility for the engineering development, acquisition or production of a weapon will develop and issue internal plans and regulations which will assure that the Judge Advocate General concerned is requested to make the legal review provided for in this Instruction prior to the engineering development and prior to the award of an initial contract for production of that weapon. All DoD Components having data relevant to the legal review will provide such data to the Judge Advocate General concerned upon his request.

C. Nothing in this Instruction shall be construed as derogating from the functions and responsibilities vested in the General Counsel of the Department of Defense by 10 U.S.C. 137 ... and DoD Directive 5145.1 ... Upon request of the Secretary of Defense, the Secretary of a Military Department, the Director of Defense Research and Engineering, the Assistant Secretary of Defense (Installations and Logistics) or any Judge Advocate General, the General Counsel will review any opinion issued by a Judge Advocate General in implementation of this Instruction.

D. The Director of Defense Research and Engineering will, during the research, development, testing and evaluation phases of the acquisition of weapons, be responsible for monitoring compliance by DoD Components with Section IV. B. of this Instruction.

E. The Assistant Secretary of Defense (Installations and Logistics) will, during the production phase of the acquisition of weapons, be responsible for maintaining compliance by DoD Components with Section IV. B. of this Instruction.

Reserve Components Notes

1. 6th JAG Detachment.

On the week end of 9–10 June, the 6th JAG Detachment, commanded by Colonel Samuel J. Steiner, held a judicial conference at Fort Worden State Park, which is located immediately adjacent to the City of Port Townsend, on Washington State's Scenic Olympic Peninsula.

Fort Worden, a former Coast Artillery Post, was conveyed to the State of Washington some years ago, and has since been preserved for park purposes. The post is approximately an hour and a half from Seattle by ferry and automobile.

During the conference, personnel of the 6th, 89th and 226th JAG Detachments participated in workshops and panel discussions involving trial and appellate practice. Project officer for the MUTA 3 was Colonel Jerome Shulkin, who was assisted by Major Thomas J. Kraft.

Featured speakers included Honorable Frank H. Roberts, Jr. (Colonel, Ret.) Judge of the Superior Court of the State of Washington; Colonel (Ret.) Josef Diamond, counsel for the plaintiff in the case of *Defunis* v. *Washington*; Honorable Kenneth S. Treadwell (Lieutenant Colonel, Ret.) Bankruptcy Judge of the United States District Court for the Western District of Washington, at Seattle; and the Honorable Keith M. Callow, Judge of the Washington State Court of Appeals.

Other guests included former Commanders of the 6th JAG Detachment, Colonels (Ret.), Richard M. Thatcher and Lawrence W. Wanichek, and Colonel Robert C. Wetherholt, Staff Judge Advocate of the 124th ARCOM.

In addition to the training sessions, highpoints of the conference included activities for wives and children, camping on Fort Worden's Puget Sound beaches, and a cocktail party in the quarters formerly used by the Post Commanders which was hosted by Colonels Steiner and Shulkin.

2. 120th JAG Detachment.

The 120th JA Detachment (USAR), a reserve judge advocate procurement team based in Denver, Colorado, returned for the second consecutive year to Fort Huachuca, Arizona for annual training. The two week active duty period was served in the Office of the Staff Judge Advocate at Fort Huachuca under direct supervision of Staff Judge Advocate LTC Joseph De Francesco, one of the Army's leading authorities in the procurement law field.

LTC De Francesco reversed the tables by visiting the 120th in Denver on September 21 during a weekend drill to provide classroom instruction on procurement method, using as examples actual cases he has been involved with during his Army Career. The Colonel's considerable experience and expertise in the procurement law field provided the basis for a most informative and interesting class.

Although it is not unusual for reserve judge advocate units to be given instruction by active duty JA personnel, it is unusual for active duty personnel from the reserve type discussed above. The value of this unusual procedure is immediately obvious. The 120th is already familiar with LTC De Francesco and the type of work performed in his office. The Colonel was, therefore, able to relate his instruction directly to work performed, in an OJT capacity, by members of the 120th at Fort Huachuca during the past two summers and, assuming the 120th continues to return to Fort Huachuca for annual training, to be performed in future summers.

LTC De Francesco and LTC Bernard H. Thorn, Commander of the 120th, are both enthusiastic about the success of this method of instruction and highly recommend it to reserve units as a means of injecting practicality into class room instruction. LTC De Francesco also views it as an opportunity to cement the feeling of a one Army concept.

TJAGSA—Schedule of Resident Continuing Legal Education Courses Through 30 August 1975

Number	*Title*	*Dates*	*Length*
5F–F8	17th Senior Officer Legal Orientation	4 Nov–7 Nov 74	3½ days
5F–F11	60th Procurement Attorneys	11 Nov–22 Nov 74	2 wks
CONF	U.S. Army Reserve Judge Advocate Conference	4 Dec–6 Dec74	3 days
5F–F10	11th Law of Federal Employment	9 Dec–12 Dec 74	3½ Days
5F–F12	5th Procurement Attorney, Advanced	6 Jan–17 Jan 75	2 wks
5F–F17	1st Military Administrative Law and the Federal Courts	13 Jan–16 Jan 75	3½ days
5F–F8	18th Senior Officer Legal Orientation	27 Jan–30 Jan 75	3½ days
7A–713A	5th Law Office Management	3 Feb–7 Feb 75	1 wk
5F–F15	2d Management for Military Lawyers	10 Feb–14 Feb 75	1 wk
CONF	National Guard Judge Advocate Conference	2 Mar–5 Mar 75	4 days
5F–F11	61st Procurement Attorneys	24 Mar–4 Apr 75	2 wks
5F–F13	2d Environmental Law	7 Apr–10 Apr 75	3½ days
5F–F8	20th Senior Officer Legal Orientation	14Apr–17 Apr 75	3½days
5F–F8	*19th Senior Officer Legal Orientation	28 Apr–1 May 75	4 days
(None)	3d NCO Advanced	28 Apr–9 May 75	2 wks
5F–F6	5th Staff Judge Advocate Orientation	5 May–9 May 75	1 wk
5–27–C8	22d JA New Developments Course (Reserve Component)	12 May–23 May 75	2 wks

Number	*Title*	*Dates*	*Length*
5F-F1	17th Military Justice	16 Jun-27 Jun 75	2 wks
5F-F1	Administration Phase	16 Jun-20 Jun 75	1 wk
5F-F1	Trial Advocacy Phase	23 Jun-27 Jun 75	1 wk
5F-F8	21st Senior Officer Legal Orientation	30 Jun-3 Jul 75	3½ days
5F-F9	14th Military Judge	14 Jul-1 Aug 75	3 wks
5F-F3	19th International Law	21 Jul-1 Aug 75	2 wks
5F-F11	62d Procurement Attorneys	28 Jul-8 Aug 75	2 wks
	*Army War College Only		

Personnel Section

JAG Counsel Commended.

5 September 1974

General W. T. Kerwin, Jr
Commanding General
Headquarters, USA Forces Command
Fort McPherson, Georgia 30330

Dear General Kerwin:

As you are well aware, Commanders receive many letters, some complimentary and appreciative, some requesting assistance and some complaining or demanding.

The enclosed letter was placed on my desk after a rather trying morning and it helped make my day more pleasant. I want to share it with you because to me the remarks, coming as they do from a civilian lawyer who was on the losing end of a legal argument with the military, are rather unusual. I can only add that once again it proves what dedicated professional personnel can accomplish in projecting a favorable image of the Army.

The case mentioned involved an individual, carried on Army rolls as a deserter, who turned himself in here at Fort MacArthur, claiming he had received a medical discharge (no record). His lawyer appeared before a Federal Magistrate claiming the Army had no jurisdiction and succeeded in obtaining a restraining order against our shipping the individual to Fort Ord. There followed several days of litigation, and legal maneuvering with the Federal Magistrate finally ruling in favor of the Army.

I am very proud of the officers and enlisted personnel mentioned and will express my appreciation in an appropriate manner.

Recognizing the many problems you must address each day, I sincerely hope the attached will be one of the brighter spots in your busy schedule.

Sincerely,

CLARENCE E. GENTRY
Colonel, Infantry
Commanding

The correspondence to which Colonel Gentry referred read as follows:

August 26, 1974

Colonel Clarence E. Gentry
Commander
Fort MacArthur, California

Re: v. U.S. Army

Dear Colonel Gentry:

We are the "bad guys" (from the Army's point of view) in connection with the recent case of an alleged deserter who, by the time you receive this letter, will likely be at Fort Ord, California, after overstaying his welcome at your facility. I felt compelled, however, to write you this letter commending several of your officers and enlisted men.

It has been my pleasure to meet and deal with Captain , Captain and Captain of your Judge Advocate General staff. It has also been my pleasure to meet and deal with Captain , your Provost Marshal, and several enlisted men under his command, namely Specialists , and . Each of the foregoing persons favorable impressed me with his courtesy, his interest in my particular problems and with the efficient dispatch of his duties.

It is rare that I get the opportunity to write about my adversaries, rarer still when I have anything good to say about them. However, in this case I am obliged to give credit where it is due, as follows:

Captain and Captain , while advocating the position of the Army, were most helpful in directing my efforts toward a position which served the ends of my client as well as the Army. They impressed me as being very fine lawyers as well as officers. Although I thrust my problems at Captain during some off-duty hours, he was most accommodating and generous with his personal time and attention to my requests.

Captain also made himself available to me during his off-duty hours (assuming he has any such hours) and particularly struck me with his desire to treat my client as a human being; he was a most fairminded jailor. His men, named above, went out of their way to oblige my—and my client's—needs. Access to my client was made available to me at varied hours and at all times on the telephone; I only wish that I had such access to my civilian prisoners.

Particularly, however, I wish to commend Captain , who associated himself with us as defense counsel. His advice, skill and research were most helpful; without his grasp of the problem and knowledge of military remedies we would have been operating at a great disadvantage. Captain took up a number of his home hours in advising us and met with me on a Sunday afternoon to give me the benefit of his research. He was most cooperative, pleasant and authoritative, giving me a great deal of confidence in the fact that he was on our team while at the same time always remaining representative of the Army. Captain 's enthusiasm was a comfort to our client and to ourselves.

My recollections of the military go back some 16–18 years when, I recall, it seemed that justice was not so diligently—nor sympathetically—executed. I approached this instant problem anticipating the curt treatment I recalled, only to be greatly overwhelmed by the open-handed and courteous treatment afforded to me. Thus, I trust that you appreciate the fine gentlemen commanded by you much the same as I appreciated by brief exposure to them.

Very truly yours,

Current Materials of Interest

Conference. "The Military and the Laws of Virginia" sponsored by the Office of the Attorney General of Virginia. Presented for Staff Judge Advocates and other attorneys serving the United States Armed Forces in the Commonwealth of Virginia. December 17, 1974. Virginia Employment Commission Auditorium, 703 East Main Street, Richmond, Virginia 23219. No cost, no advance reservations required. Detailed presentations will be conducted on such major topics as: Housing Military Families, Problems in Military Living, Protecting the Military Consumer, Enhancing the Military Environment and The Military and the Criminal Justice Process.

Seminars. The following seminars are being offered by the National College of District Attorneys for the winter. To register or obtain further information write to that organization % College of Law, University of Houston, Houston, Texas 77004, or telephone (713) 749–1571.

December 10–14	Advanced Organized Crime Houston, Texas
January 15–18	Pretrial Strategy Denver, Colorado
March 11–15	Organized Crime San Diego, California
March 23–26	Major Fraud/White Collar Crime Tampa, Florida

By Order of the Secretary of the Army:

FRED C. WEYAND
General, United States Army
Chief of Staff

Official:
VERNE L. BOWERS
Major General, United States Army
The Adjutant General